

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

CHARLESTON

CEDEAL T. HARPER,

Plaintiff,

v.

Case No. 2:12-cv-00656

**CAPTAIN JAMES MCCLOUD,
DAVID BALLARD, and
JIM RUBENSTEIN, COMMISSIONER,**

Defendants.

PROPOSED FINDINGS AND RECOMMENDATION

Pending before the court are two Motions for Partial Summary Judgment filed by the plaintiff (ECF Nos. 35 and 41.) Although one of the motions is typed and the other is hand-written, the motions appear to be substantively similar, alleging that Captain James McCloud's actions in allowing the utilization of chemical agents in the plaintiff's segregation cell were not warranted and were unconstitutional.

The undersigned has lifted a stay of discovery in this matter and discovery requests relevant to the plaintiff's claims are outstanding. On November 14, 2012, the defendants filed a Response in Opposition to the Plaintiff's Motion for Partial Summary Judgment (ECF No. 46), asserting that there remain material issues of fact in dispute, and that the parties should be permitted to engage in further discovery prior to a ruling on dispositive motions.

The undersigned proposes that the presiding District Judge **FIND** that the plaintiff's Motions for Partial Summary Judgment are premature. It is respectfully


RECOMMENDED that the plaintiff's Motions for Partial Summary Judgment (ECF Nos. 35 and 41) be **DENIED** without prejudice, pending the conclusion of the discovery process. All parties will then be granted an opportunity, as set forth in the accompanying Order and Notice, to file and respond as necessary to dispositive motions under Rule 56 of the Federal Rules of Civil Procedure.

The parties are notified that this Proposed Findings and Recommendations is hereby **FILED**, and a copy will be submitted to the Honorable Thomas E. Johnston, United States District Judge. Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Rules 6(d) and 72(b), Federal Rules of Civil Procedure, the parties shall have fourteen days (filing of objections) and three days (mailing) from the date of filing this Proposed Findings and Recommendations within which to file with the Clerk of this Court, specific written objections, identifying the portions of the Proposed Findings and Recommendations to which objection is made, and the basis of such objection. Extension of this time period may be granted by the presiding District Judge for good cause shown.

Failure to file written objections as set forth above shall constitute a waiver of de novo review by the District Court and a waiver of appellate review by the Circuit Court of Appeals. *Snyder v. Ridenour*, 889 F.2d 1363 (4th Cir. 1989); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984). Copies of such objections shall be provided to Judge Johnston.

The Clerk is directed to file this Proposed Findings and Recommendations and to mail a copy of the same to the plaintiff and to transmit a copy to counsel of record.

November 15, 2012


Mary E. Stanley
United States Magistrate Judge